IN THE SUPREME COURT OF FLORIDA

GARY GOULD,

Petitioner,

v. CASE NO. 75,833

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

/aoh

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STATEMENT OF THE CASE AND FACTS

Appellee relies on the additional facts as follows:

T[redacted] S[redacted] hands were taped so that she could not resist Appellant's sexual attacks (R. 37, 38). Her limbs were tied with bed sheets to various bathroom fixtures so that Appellant would have unfettered access to her vagina and anus (R. 42, 43, 44). She was bound so tightly that her hands turned purple (R. 45). She testified that she could not move while she was bound (R. 43). During further sexual and physical batteries, her hands were again retied behind her back (R. 50). She was unable to resist appellant's oral sex acts while tied up on the bed (R. 53).

Though Appellant had been drinking when he attacked K[redacted] K[redacted] he had not imbibed to the point of intoxication (R. 152, 153). Appellant forced K[redacted] K[redacted] into another room in order to beat and bind her (R. 154). Ms. K[redacted]'s child was in the home asleep when Appellant attacked K[redacted] (R. 155). Appellant tied her up in order to render her incapable of resisting his threats and blows (R. 155). He tied K[redacted]s limbs to fixtures on a bed (R. 156). He threatened K[redacted] with a knife, a sword, and a hatchet (R. 157, 158, 160). Appellant cut a clump of her hair off (R. 159). He hit and punched K[redacted] K[redacted] against her will. After it was all over, he fell asleep (R. 165).

SUMMARY OF THE ARGUMENT

Appellant fails to recognize that Category II lesser included offenses can indeed become necessarily lesser included offenses, depending upon the pleadings and the facts adduced at trial. He waived any argument that 794.011(5) is not a lesser included offense of 794.011(4)(a) in this case because he requested the same be given as a lesser included offense instruction at trial.

The Second District did not base its decision to apply Section 924.34 to the instant case based upon any notion that the sexual battery statute is somehow laid out in terms of degree of the crime. Accordingly, his argument on this point is mere dicta.

The application of 924.34 does not deny Appellant due process inasmuch as he was prepared to try his case on the basis of subsection (5), from the outset. There is no reason he needs to be retried on the very same facts if he was willing to be convicted under subsection (5) in the first place.

There was no need to remand this case for retrial simply because the district court found subsection (5) to be a necessarily lesser included offense of the crime originally charged. Section 924.34 allowed the appellate court to take an independent look at the evidence in order to determine whether entry of judgment on a lesser offense was warranted. Because

Appellant never challenged the denial of his proposed lesser included offense instruction's, he should be barred from relying on such an argument herein.

Appellant has no standing to argue that the district court preempted the State's right to decide whether and how to prosecute him.

Appellant's conviction for kidnapping is valid because his movement and confinement of Tracey Slezak made the crime substantially easier to commit. He didn't just abuse her where he found her. He forced her to move so that he could commit his atrocious acts with greater ease.

ARGUMENT

ISSUE I

WHETHER THE SECOND DISTRICT COURT OF APPEAL IN ITS APPLICATION OF SECTION 924.34, FLORIDA STATUTES (1987), VIOLATED THE DUE PROCESS OF RIGHTS OF PETITIONER AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE XIV OF THE FLORIDA CONSTITUTION.

Petitioner, Gary Gould, has had a full and fair opportunity to litigate all issues, at the trial level, that he claims prohibit the district court from finding him guilty of the lesser included offense of sexual battery with force not likely to cause serious personal injury. He bases the instant Petition on several assumptions that appear to totally ignore the Second District's reasoning and are blind to his own posture at trial.

Petitioner begins with a non sequitur at the very premise of his argument. He claims that the district court could not have convicted him of sexual battery under Section 794.011(5), Florida Statutes because sexual battery is not a degree crime and is not a necessarily lesser included offense of sexual battery under Section 794.011(4)(a). Yet, in the same breath, he strives to point out that he had implored the trial court to give subsection (5) as part of the "other lesser's". Accordingly, he defeats his own argument inasmuch as he has already conceded, at the trial level, that, under the facts of this case, sexual battery with physical force and violence not likely to cause serious personal injury is indeed a "lesser included offense" of sexual battery

on a victim (Tracey Slezak) who is physically helpless to resist. In short, he cannot have it both ways.

The Second District recognized that necessarily included lesser offenses are "[O]ffenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence. . . ". See Comment on Schedule of Lesser Included Offenses. They do not have to be Category I necessarily lesser included offenses. This Court recognized the same in Gallo v. State, 491 So.2d 541 (Fla. 1986). Though Appellant cites to Brown v. State, 206 So.2d 377 (Fla. 1968) for the proposition that one offense cannot be a lesser included offense of the other if one requires proof of an element that the other does not, he still seems unable to grasp the concept, on appeal, that the evidence adduced at trial may indeed make an otherwise non-inclusive offense into a necessarily inclusive one. That he grasped such a concept at trial by requesting subsection (5) as a lesser only serves to demonstrate that the facts, as he observed them unfold at trial, fully support the district court's decision to convict him of sexual battery with physical force and violence not likely to cause serious personal injury.

Appellant further belabors a brick wall distinction between the two offense by arguing that the information does not support a conviction for a subsection (5) sexual battery. Once again, he should not be heard to complain. If anything, he acquiesced in any alleged defect in the information by failing to object to the same at trial and he simply compounded his acquiescence by

specifically requesting subsection (5) be given as a lesser included offense. Thus, the test should be one based upon the law of variance between the proof and accusatory pleading. Appellant should be called upon to demonstrate that he was deprived of "fair notice sufficient to enable him to prepare his defense". United States v. Lambert, 501 F.2d 943 (5th Cir. 1974). See also United States v. Prince, 883 F.2d 953 (11th Cir. 1989), standard of review is whether a material variance did indeed occur, and, second, whether the defendant suffered substantial prejudice as a result of the variance. Herein, he waived any variance by requesting subsection (5). Accordingly, he cannot possibly claim any prejudice if, after appeal, he got exactly what he wanted in the first place! Contra, see Falstreau v. State, 326 So.2d 194 (Fla. 4th DCA 1976).

Probably the most overlooked point in his entire appeal is the very facts of the case. He simply cannot come to grips with the utterly overwhelming, if not sickening scenario of his sexual attack on Tracey Slezak. Indeed, even the most rational fact finder would be able to agree that the force and violence he employed might very well give rise to a conviction under 794.011(4)(b); coercion by threatening to use force or violence likely to cause serious personal injury. The Second District did not "buy" the argument that the egregious facts below do not, at the very least, constitute a subsection (4)(a) sexual battery. This Court should not indulge the same.

Next, Appellant argues that section 924.34 is inapplicable to his case because the sexual battery statute is not laid out in terms of degrees. Indeed, the Second District agreed with Appellant, and this Court, that the various levels of sexual battery are not currently divided into degrees of the crime (as opposed to degrees of felony) and declined to so hold. Brown, supra. However, the legislature chose to write 924.34 in the disjunctive, leaving an appellate court free to reconvict an Appellant if the contemplated crime is of a lesser statutory degree or is a necessarily lesser included offense. The district court imposed the operation of 924.34 on the latter basis. Unless this Court is willing to overrule Brown and the legislature, Appellant's argument on this point should be deemed dicta.

Finally Appellant lodges a constitutional challenge to the operation of 924.34 claiming that he was denied due process by not having the opportunity to have the resulting charge tried before a jury. He claims that "[I]f an instruction had been given on subsection (5), Petitioner would have received a trial on all charges and would have had a jury consider that charge also". He further asserts that if the jury would have been so instructed, he may have been the benefactor of a "jury pardon". Obviously, to a fault, Appellant had it well in mind to go to trial with all of his proposed lesser's in mind, including subsection (5). The ironic conclusion of his argument is equally as obvious - had he been convicted at trial of sexual battery

under subsection (5) he would have nothing to complain about, yet, on appeal, his conviction by way of 924.23 would be unconstitutional. Appellant did not challenge the trial court's denial of his proposed lesser on direct appeal. He cannot do so now by way of a constitutional challenge. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). With his lesser's in mind at trial, he had the full and fair opportunity to seek a "jury pardon" by offering evidence that his brutality was not likely to cause any injury at all. Moreover, for the jury to have "pardoned" him would have been a miscarriage of justice. Accordingly, his due process claims are without merit.

ISSUE II

WHETHER SECTION 924.34 ALLOWS AN APPELLATE COURT TO DIRECT THE LOWER COURT TO ENTER JUDGMENT ON A LESSER INCLUDED OFFENSE BASED UPON ITS OWN INDEPENDENT EVALUATION OF THE RECORD?

For his next issue, Appellant claims that once the district court found 794.011(5) to be a necessarily lesser included offense of 794.011(4)(a), it should have remanded the case for retrial. Because the trial court failed to instruct on subsection (5), Appellant further claims that such was fundamental error requiring nothing short of reversal and remand. However, if indeed he felt so strongly about the trial court's denial of his proposed lesser, then he should have raised the issue on direct appeal.

This Honorable Court sits in review of the district court's decision just as the district court has sat in review of the trial court's decisions. The district court, sua sponta, took up the issue of applying 924.34 to the facts of this case. Appellant below lodged no appellate attack on the issue of failure to give jury instructions on lesser included offenses. Accordingly, he should not be allowed to complain at this stage of the proceedings. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Moreover, Appellant cannot cite, and Appellee cannot find, any decision holding that failure to instruct on a later recognized lesser included offense at trial precludes the

application of 924.34. (However, see Suarez v. State, 136 So.2d 367 (Fla. 1st DCA 1962) wherein other errors may preclude the application of 924.34). The Second District below reasoned that 924.34 "permits the appellate court to look directly to the evidence and make its own independent evaluation of that evidence". Nothing in the language of the statute dictates a contrary legislative intent. To interpret the statute differently would surely defeat the purpose of having an appellate court accomplish all that could be accomplished by the trial court, absent the time, expense, (and often heartache) of a new trial that would invariably be nothing more than a rehash of the same evidence adduced at the first trial.

Finally, Appellant has already gotten what he wanted at trial. He wanted an instruction on subsection (5). He is currently convicted under said section. He should not have another shot at acquittal where, as here, the very same evidence, unquestionably, makes out a case for guilt beyond any reasonable doubt. Moreover, he cannot be heard to argue that retrial is necessary so that he can better prepare a defense against a subsection (5) charge. After all, he originally went to trial with subsection (5) in mind. Ergo, to let him retry his case would be tantamount to giving the defendant another trial just so he can get it right the second time after first having had a "practice run" in the very same trial courtroom.

ISSUE III

APPELLANT HAS NO STANDING TO ARGUE THAT THE DISTRICT COURT PREEMPTED THE STATE'S EXECUTIVE DISCRETION TO PROSECUTE APPELLANT.

Appellant claims that the state's right to decide what charges it will bring has been preempted by the district court's application of 924.34. He asserts that the state forfeited its right to gain conviction under subsection (5). Appellee queries how Appellant can argue such a point on behalf of the state when, in fact, he is not the state. He has no standing to assert such a claim.

In Wilcott v. State, 509 So.2d 261 (Fla. 1987), Justice Shaw indicated by way of a dissenting opinion that:

> Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.

Moreover,

> . . . article II, section 3 of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor.

Herein, though the state might have wanted an "all or nothing" verdict at trial, it is the operation of statute that has brought about the instant conviction. The state, pursuant to its executive power, has not appealed that decision. Therefore, Appellant cannot stand in the state's shoes and, somehow, assert a right that the state has chosen not to exercise.

ISSUE IV

APPELLANT WAS CONVICTED OF KIDNAPPING BECAUSE HIS FORCEFULL MOVEMENT OF THE VICTIM MADE IT EASIER FOR HIM TO COMMIT SEXUAL BATTERY.

For the sake of brevity, clarity and uniformity, Respondent relies on the arguments made in Issue III of its responsive brief below and further relies on the reasoning of the district court, both found herein in Petitioner's Appendix. Said argument is laid out below for the benefit of this Court.

ISSUE III

THE FORCIBLE MOVEMENT OF TRACEY SLEZAK WAS SUFFICIENT TO SUSTAIN A CONVICTION FOR KIDNAPPING BECAUSE THE MOVEMENT MADE THE COMMISSION OF THE OTHER CRIMES SUBSTANTIALLY EASIER TO COMMIT.

Appellant has conveniently overlooked the last portion of the three pronged test found in Ferguson v. State, 533 So.2d 763 (Fla. 1988) which indicates that, for kidnapping, the movement or confinement must have some significance independent of the other crime in that it makes the other crime substantially easier to commit.

Sub judice, Appellant forced Ms. Slezak to hop to the bathroom. Thereafter, he proceeded to tie her limbs to various bathroom fixtures so that he could forcibly shove foreign objects into her sexual and anal cavities without physical opposition. It is painfully obvious that, by binding her limbs to various

bathroom fixtures, it was much easier for Appellant to carry out such atrocious acts. That he ultimately performed oral sex upon Tracey Slezak while she was confined to a bed is of no particular moment. Though Appellant could have performed the same acts upon her in the bedroom does not detract from the plain fact that the initial movement to the bathroom and confinement therein made the crimes perpetrated while in the bathroom easier to commit.

In Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), a sexual battery victim was already inside a car when the crime took place. The vehicle was not used to transport her, involuntarily, to a place where she could more easily be attacked or where the risk of detection would have been reduced. She willingly drove with the perpetrator to a spot where, thereafter, the crime took place. Thus, the confinement to the car was only a natural incident of the sex crime. In the instant case, Appellant deliberately forced Ms. Slezak, against her will, into a place of confinement that made the sexual and other batteries easier to commit. He did not have to move her to the bathroom, but, he did so for the sole purpose of providing anchor points to which she could be bound. Unlike the situation in Robinson, Appellant chose not to commit his acts simply where he found his victim. Rather, he moved her so that his crimes were rendered easier to commit. Accordingly, the movement and confinement caused by Appellant was not inconsequential and was not inherent in the crimes of sexual battery.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence should be affirmed..

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar #: 365645
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar #0261041
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607

CO-COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Andra Steffen, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 10th day of October, 1990.

OF COUNSEL FOR RESPONDENT